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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

*v.*

MISSOURI STATE HIGHWAY PATROL, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED

Whether the respondent established that its age limitations for hiring and compulsorily retiring law enforcement personnel were bona fide occupational qualifications.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statutory provisions involved | 2 |
| Statement | 4 |
| Reasons for granting the petition | 7 |
| Conclusion | 9 |
| Appendix A | 1a |
| Appendix B | 27a |
| Appendix C | 49a |
| Appendix D | 50a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985) | 8 |
| *Johnson* v. *Mayor of Baltimore*, 731 F.2d 209, rev'd, No. 84-518 (June 17, 1985) | 6, 8, 9 |
| *Swanson* v. *Baker Industries, Inc.*, 615 F.2d 479 | 8 |
| *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 | 4-5, 6, 8 |
| *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (June 17, 1985) | 5, 7, 8 |


Statutes and rule:


| | |
|---|---|
| Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* | 4 |
| § 4, 29 U.S.C. 623 | 2 |
| § 4(a)(1), 29 U.S.C. 623(a)(1) | 4 |
| § 4(f)(1), 29 U.S.C. 623(f)(1) | 4 |
| § 4(f)(2), 29 U.S.C. 623(f)(2) | 4 |
| 5 U.S.C. 8335(b) | 6, 8 |
| Mo. Rev. Stat. (Vernon Supp. 1985): | |
| § 43.060 | 2, 4 |
| § 104.010 | 2 |
| § 104.080 | 2, 4 |

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 748 F.2d 447. The opinion of the district court (App., *infra*, 27a-48a) is reported at 555 F. Supp. 97.

### JURISDICTION

The judgment of the court of appeals was entered on November 12, 1984 (App., *infra*, 49a). A petition for rehearing was denied on January 28, 1985 (App., *infra*, 50a), and on April 16, 1985, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 27, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623, provides in pertinent part:

> (a) * * * It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * * * *
>
> (f) * * * It shall not be unlawful for an employer * * *
>
> > (1) to take any action otherwise prohibited under subsection[] (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

Mo. Rev. Stat. §§ 43.060, 104.010, 104.080 (Vernon Supp. 1985) provide in pertinent part:

> § 43.060 Qualifications of patrolmen and radio personnel and limits on activities
>
> 1. Patrolmen and radio personnel shall not be less than twenty-one years of age and shall not have reached their thirty-third birthday at the time of their appointment * * *.

§ 104.010 Definitions

Whenever in sections 104.010 to 104.270 * * * the following words or terms are used, unless the context clearly indicates that a different meaning is intended, they shall have the following meanings:

* * * * *

(21) "Member", a member of the highways and transportation employees' and highway patrol retirement system, without regard to whether or not he has been retired;

* * * * *

(23) "Normal retirement age", the later to occur of the attainment of sixty years of age for patrolmen and sixty-five years of age for all other members, or the completion of four years of creditable service;

(24) "Patrol", the Missouri state highway patrol;

(25) "Patrolmen", or "members of the patrol", the superintendent, lieutenant colonel, majors, captains, director of radio, lieutenants, sergeants, corporals, and patrolmen of the Missouri state highway patrol who normally appear in uniform * * *.

§ 104.080 Members to retire, when—compulsory retirement

Each member shall retire at the end of the month during which such member shall reach normal retirement age with a normal annuity except that any patrolman may retire at age fifty-five with a normal annuity, and except that any employee of the state highways and transportation department, upon written request and with * * * written approval * * * may be retained for successive periods of one year until age seventy, when retirement shall be compulsory.

## STATEMENT

1. The Equal Employment Opportunity Commission (EEOC) brought this action in the United States District Court for the Western District of Missouri to challenge the Missouri Highway Patrol's policies of mandatorily retiring all patrolmen [1] at age 60, and refusing to hire patrolmen or radio operators over age 32.[2] The Commission alleged that these policies violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

Since June 1982, Mo. Rev. Stat. § 104.080 (Vernon Supp. 1985) has required all uniformed members of the Patrol to retire at age 60. Prior to that time the mandatory retirement age was 65, but, from ages 55 to 65, continued employment rested in the discretion of the superintendent of the Patrol (App., *infra*, 29a-30a). The hiring limitation of age 32 for both patrolmen and radio operators was established by Section 43.060. The Patrol has not hired anyone over age 32 since 1945 (App., *infra*, 35a).

Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), prohibits employers from refusing to hire or discharging persons because of their age; Section 4(f)(2), 29 U.S.C. 623(f)(2), specifically prohibits involuntary retirement prior to age 70. The Patrol, however, defended the Missouri statutory limitations as "bona fide occupational qualifications" (BFOQ) under Section 4(f)(1) of the Act, 29 U.S.C. 623(f)(1). The district court heard 40 witnesses over five days of trial on the issue of the BFOQ defense. Applying the test enunciated in *Usery* v. *Tamiami Trail*

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[1] "Patrolmen" is used herein to describe uniformed members of the Patrol of all ranks, *i.e.*, trooper through colonel.

[2] EEOC's action was consolidated with a prior suit by Calvin Price contesting application of the mandatory retirement age to him.

*Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976),[3] it made detailed factual findings and concluded (App., *infra*, 42a):

> The defendants have failed to prove that their mandatory retirement age of 60 is a BFOQ for members of the Patrol. Their evidence does not show that substantially all persons over age 60 are unable to safely and efficiently perform the duties of a patrolman, or that some persons over age 60 possess traits precluding safe and efficient performance unascertainable other than through knowledge of the patrolman's age. The testimony of their experts was not persuasive and was often contradictory.

The court also found that respondents "failed to prove that their maximum hiring age of 32 is a BFOQ for radio operators" (*id.* at 46a), but upheld the maximum hiring age for patrolmen (*id.* at 47a).

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[3] As this Court explained in *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (June 17, 1985), slip op. 12-13 (footnotes omitted, brackets in original), the *Tamiami* test requires the employer to show, first, that its "restrictive job qualifications are 'reasonably necessary' to further the overriding interest in public safety," and second, that:

> the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry. This showing could be made in two ways. The employer could establish that it " 'had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved' " * * *.
>
> Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is " 'impossible or highly impractical' " to deal with the older employees on an individualized basis.

2. On cross appeals, a divided panel reversed the district court's findings that the mandatory retirement age for patrolmen and the maximum hiring age for radio operators were not BFOQ's (App., *infra*, 23a). Judge McMillian dissented from these rulings, but concurred with the majority in affirming the lower court's acceptance of a maximum age 32 as a BFOQ for patrolmen applicants (App., *infra*, 23a-26a).

The panel majority undertook in detail to apply the *Tamiami* test to the factual record in this case.[4] In so doing, it found "persuasive" the fact that 5 U.S.C. 8335(b) authorizes mandatory retirement at age 55 for federal law enforcement and firefighting personnel (App., *infra*, 19a-20a), citing with approval *Johnson* v. *Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984), rev'd, No. 84-518 (June 17, 1985).[5] The panel majority also disagreed with the district court's evaluation of the testimony of respondents' expert witnesses (App., *infra*, 14a-18a, 22a):

> Although the District Court discounted the Patrol's expert evidence as "not persuasive" and

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[4] Having found that respondent satisfied the first prong of the *Tamiami* test (see note 3, *supra*) by showing that "physical ability and ability to withstand stress" are reasonably necessary job qualifications, the court asserted "that in these terms there is a correlation between the mandatory retirement age of sixty and the safe and efficient performance of the Patrol's functions" (App., *infra*, 8a).

[5] The court analogized the state mandatory retirement provisions to Section 8335(b): "We believe that it is no less valid for the State of Missouri to be concerned with the youth and vigor of its law enforcement personnel" (App., *infra*, 19a). It therefore accorded "some" or "considerable" deference to the state legislative judgment (App., *infra*, 5a).

> "often contradictory," * * * we find this conclusion wholly unsupported by the record * * *.
>
> * * * * *
>
> In summary, the Patrol has established that there is a factual basis for believing that substantially all Patrol members over the age of sixty lack sufficient aerobic capacity to perform their duties safely and efficiently. The Patrol also has established the inefficacy of testing as an alternative to age, as a means of distinguishing among individuals over sixty.
>
> * * * * *
>
> We find the Patrol's evidence highly persuasive. Further, from our review of the record we are unfavorably impressed by the plaintiffs' efforts, which at best can be described as minimal, to rebut the Patrol's convincing showing that the age thirty-two hiring cap [for radio operators] is a BFOQ.

Judge McMillian in dissent maintained that neither the state nor federal statutes providing for early retirement relaxed the burden that Congress has placed upon respondent to justify its age-based employment restrictions as reasonably necessary (App., *infra*, 23a-25a); he also concluded that the district court's findings of fact based on the conflicting expert testimony were not clearly erroneous.

## REASONS FOR GRANTING THE PETITION

This case directly involves several legal issues that have recently been decided by this Court. In *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (June 17, 1985), this Court elaborated on the standard to be applied in establishing a BFOQ for employment in which public safety is a critical factor,[6] emphasizing

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[6] It is not at all clear that the court of appeals applied the legal standard that this Court has now established. In con-

(slip op. 20-22) that Congress left the evaluation of conflicting expert testimony to the trier of fact. The court of appeals' decision was also issued before this Court, in *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985), re-emphasized and clarified, in the context of employment discrimination litigation, the deference due by appellate courts to the district court's factual findings (slip op. 8-10).[7] And in *Johnson* v. *Mayor of Baltimore*, No. 84-518 (June 17, 1985), this Court held that the legislative history of 5 U.S.C. 8335(b), precisely the same statute that the court below found persuasive, "establish[es] that Congress at no time has indicated that the federal retirement age * * * is based on a determination that age 55 is a bona fide occupational qualification within the meaning of the ADEA. * * * We therefore con-

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cluding that the Patrol had satisfied the first part of the *Tamiami* test (see note 3, *supra*), the court of appeals stated (App., *infra*, 8a) that there was "a correlation between" the mandatory retirement age and the safe and efficient performance of the Patrol's duties. But, as this Court explained in *Criswell*, the first part of the *Tamiami* test relates solely to the validation of the qualifications involved—here, the ability to perform arduous duty under stressful conditions (slip op. 11-12). The relationship between these qualifications and age is addressed only in the second part of the *Tamiami* test, which requires not merely a correlation, but a showing that "the employer is compelled to rely on age as a proxy for the * * * job qualifications validated in the first inquiry" (slip op. 12 (footnote omitted).

[7] Although the Court noted that various courts of appeals—including the Eighth Circuit in *Swanson* v. *Baker Industries, Inc.*, 615 F.2d 479, 483 (1980)—had asserted authority to review de novo findings not based on credibility determinations, the Court expressly disavowed any such exception to the principle that deference is due to the trial court's factual findings (*Anderson*, slip op. 9).

clude that this civil service provision does not articulate a BFOQ for [state and local employees], that its presence in the United States Code is not relevant to the question of a BFOQ for [state and local employees], and that it would be error for a court, faced with a challenge under the ADEA to an age limit for [state and local employees] to give any weight * * * to the federal retirement provision" (*Johnson*, slip op. 15-16).

The court of appeals should be given the opportunity to reconsider this case in light of this Court's clarification of the applicable standards.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court for reconsideration in light of *Criswell*, *Johnson*, and *Anderson*.

Respectfully submitted.

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JUNE 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

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Nos. 83-1287, 83-1850 and 83-2636

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CALVIN PRICE, APPELLEES-CROSS-APPELLANTS

*v.*

MISSOURI STATE HIGHWAY PATROL; STATE OF MISSOURI; ALAN S. WHITMER, Superintendent of Missouri State Highway Patrol; EDWARD D. DANIEL; MISSOURI HIGHWAY & TRANSPORTATION COMMISSION; STEPHEN C. BRADFORD, APPELLANTS-CROSS APPELLEES

IN RE MISSOURI STATE HIGHWAY PATROL, PETITIONER

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Submitted Dec. 13, 1983

Decided Nov. 12, 1984

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Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) and Calvin Price, a former lieutenant in the Missouri State Highway Patrol (Patrol), sued the

Patrol, the Missouri State Highway Commission, and various state agency officials, alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 [hereinafter ADEA].[1] The District Court ruled that the Patrol's mandatory retirement age of sixty for all uniformed members violates the ADEA, that the maximum hiring age of thirty-two for radio operators violates the ADEA, and that the maximum hiring age of thirty-two for patrolmen does not violate ADEA. *EEOC v. Missouri State Highway Patrol*, 555 F.Supp. 97 (W.D.Mo. 1982). The Patrol appeals from the holdings which invalidated the mandatory retirement age and the maximum hiring age for radio operators. In its cross-appeal, the EEOC challenges that portion of the decision which upholds the maximum hiring age for patrolmen. We reverse the District Court's invalidation of the mandatory retirement age and the maximum hiring age for radio operators. We affirm its holding that the maximum hiring age for Patrolmen is valid.

On December 7, 1983, the Patrol also filed in this Court a petition for a writ of prohibition, seeking to prevent the District Court from reopening the issue of a back pay award for Sergeant James R. Hightower, a patrol member who was mandatorily retired. The parties were instructed that no ruling would be made on the petition at that time, that the EEOC should file a written response, and that the parties should be prepared to discuss the writ application on December 13, 1983, when the merits of the case were

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[1] The EEOC challenged the Patrol's mandatory retirement age for uniformed members and the maximum hiring ages for patrolmen and radio operators. Price challenged only the mandatory retirement age. These actions were consolidated.

to be argued. On December 22, 1983, we granted the petition pending further order of this Court. Because our resolution of the merits of this case rules out further consideration of relief for Hightower, we now direct the District Court to dismiss any claim that may still be pending regarding back pay for Hightower.

I.

Enacted in 1967, the ADEA originally applied only where the covered employer "engaged in an industry affecting commerce." Pub.L. No. 90-202, § 11(b), 81 Stat. 602, 605 (codified at 29 U.S.C. § 630(b)). An amendment passed in 1974, however, makes state and local governments subject to the statute. Pub.L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)).

The Patrol has not challenged the constitutionality of the extension of the ADEA to the states. Instead, the Patrol argues that its policies survive scrutiny under the statute. Accordingly, we need not and do not inquire into the constitutional issues.[2]

II.

The ADEA forbids employment restrictions based on age unless age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . ." (BFOQ). 29 U.S.C. § 623(f)(1). Thus, the ADEA recognizes that in some instances age is inherently related to ability and may be a valid occupational qualification.

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[2] We note that in *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), a divided court upheld the extension of the ADEA to the states as an exercise of Congressional power under the commerce clause.

Our Court has set forth the standards in age discrimination cases in *Hoefelman v. Conservation Commission of the Missouri Department of Conservation*, 718 F.2d 281 (8th Cir. 1983); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982); and *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1977). Under these cases, the employer has the burden of proving that its actions are within the scope of the BFOQ exemption, and the BFOQ test is that set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-36 (5th Cir. 1976).

The teaching of these precedents is that, in order to satisfy the BFOQ standard, the Patrol has the burden of establishing (1) a correlation between the age limitations in question and the safe and efficient performance of the Patrol's functions, *see Tamiami*, 531 F.2d at 235 & n. 27; *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1094 (5th Cir. 1983), and (2) that it has a factual basis for believing either that substantially all older uniformed Patrol members are unable to perform their duties safely and efficiently, or that some older Patrol members possess traits which preclude safe and efficient job performance and which cannot practically be ascertained other than through knowledge of a Patrol member's age, *see Tamiami*, 531 F.2d at 236-37.

We note that the age restrictions under which the Patrol operates are mandated by state law.[3] The Mis-

[3] *See* Mo.Ann.Stat. §§ 43.060, 104.080, 104.010(23), (25). Prior to June, 1982, the mandatory retirement statute vested the Patrol Superintendent with discretion to extend the employment of members between ages 55 and 65. The Missouri legislature subsequently lowered the upper age limit to 60.

souri General Assembly thus has made a legislative judgment that the age restrictions here in issue are in the best interest of the Patrol and the people the Patrol serves throughout the state. This fact does not relieve the Patrol from the burden of showing that each of these restrictions is a BFOQ. *See Hoefelman v. Conservation Commission*, 718 F.2d 281 (8th Cir. 1983). At the same time, in applying the BFOQ exemption, we should be guided by sound principles of federalism and should accord some deference to the state legislative declaration. *See EEOC v. City of St. Paul*, 671 F.2d at 1167 (legislative determination not entitled to presumption of correctness, but "[t]his is not to say that a legislative declaration is not entitled to considerable deference.") *Cf. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (holding that Massachusetts statute making it mandatory for a uniformed state police officer to retire at age fifty does not deny equal protection of the laws in violation of the Fourteenth Amendment).

Guided by the standards and considerations outlined above, we have carefully reviewed the record to determine whether the District Court's findings of fact are clearly erroneous and whether the District Court correctly applied the law. *See EEOC v. City of St. Paul*, 671 F.2d at 1166. We conclude that the District Court committed error in invalidating the

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1982 Mo.Laws 273, § 1. Prior to this amendment, the Patrol routinely granted extensions to persons until age 60. The Patrol's policy has been to retire all members at age 60 regardless of the member's health, job responsibilities, or job performance. The only exceptions have been very short extensions where legislation pending in the Missouri legislature would favorably affect retirement benefits. Transcript at 21.

mandatory retirement age for Patrol members and the maximum hiring age for radio operators, and that it correctly upheld the maximum hiring age for Patrol members.

III.

We turn initially to the question of the mandatory retirement age for Patrol members. Although the District Court made several findings concerning the duties and qualifications of Patrol members, it did not directly discuss the first part of the *Tamiami* test set forth above.[4] We discuss it here in order to clarify the demands that are placed on all Patrol members regardless of age or rank. The central concern of this part of the BFOQ test is illuminated by language from *Tamiami*, in which the court, in sustaining as a BFOQ a bus company's maximum hiring age of forty for intercity bus drivers, suggested that "[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving." 531 F.2d at 236. Employers are entitled to substantial discretion in judging the reasonableness of safety-related job qualifications. *Id.* at 236 n. 30.

The Patrol's main functions are to enforce the traffic laws and to maintain safety on the highway. The Patrol also does criminal work including investigations of burglaries, murders, and other crimes. Patrolmen and corporals spend the most time working the roads and conducting investigations. Higher ranking Patrol members often travel on the road as part of their normal duties or coming to and from

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[4] The District Court may have assumed that the Patrol met this aspect of the BFOQ test.

work.[5] The Patrol members' obligation to the public extends to their off-duty hours. At all times, they are expected to enforce the traffic laws and to act when a felony is committed in their presence, when someone's life is in danger, when property is threatened, and when they receive information requiring Patrol attention. All ranks, including those which are primarily administrative, participate in special assignments. For example, the Patrol steps up its policing of the highways on holiday weekends, and the participation of senior officers is required. Other special assignments include riot control, civil disturbances, natural disasters, manhunts for escaped convicts, football game details, and covering important meetings.

A member of the Patrol engages in physically and emotionally strenuous activities. His duties may involve handling verbal and physical resistance from suspects such as violent drunks or fleeing suspects. Apprehending a speeder or a drunk driver may necessitate a chase, during which the Patrol member must drive at high speeds, weave through highway traffic, and call the radio dispatcher. For instance, when Lieutenant Mills, a desk officer, was returning home from work one day, he chased a speeding motorist. After the motorist fled from his car, Mills chased him on foot. When the motorist turned on Mills and pointed a revolver at him, Mills shot and killed the motorist.

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[5] Patrol members' entering rank is that of patrolman or trooper. The upward line of progression in rank is patrolman (or trooper), corporal, sergeant, lieutenant, captain, major, lieutenant colonel, and colonel. Colonel Hoffman, the Superintendent of the Patrol, testified that there are Patrol members over the age of fifty-five in every rank.

If the Patrol member is called to an accident scene, he determines what assistance is needed, such as the immediate removal of victims from cars, applies first aid to victims, and secures the scene from further damage. Patrol members also have the sad duty of informing relatives of the seriously injured or dead. Members of all ranks recounted instances in which they assisted motorists whose vehicles were mechanically disabled or stuck in the snow. To prevent further accidents, Patrol members push cars off the road and remove hazardous objects, such as dead animals, hay bales, tires, and accident debris from the road.

The Patrol's obligations to the public mean that Patrol members of all ranks work the road, handle abusive and violent motorists, engage in high speed chases, assist motorists, and participate in other strenuous field work. Although a Patrol member may call for assistance, emergency situations do not always accord him the luxury of waiting for help. In light of these obligations and demands upon Patrol members, the Patrol has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of its functions, and that in these terms there is a correlation between the mandatory retirement age of sixty and the safe and efficient performance of the Patrol's function. *Cf. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

The Patrol also presented persuasive evidence on both alternatives of the second part of the BFOQ test: (1) a factual basis for believing that substantially all members of the Patrol over sixty are unable to perform their duties safely and efficiently; (2) that there is no reliable alternative to distin-

guish qualified from unqualified Patrol members other than age. Dr. Alexander Lind, an expert physiologist, testified on the effect of age on a person's aerobic capacity Dr. Albert Antlitz, an expert in cardiology with extensive experience with the law enforcement field, explained the susceptibility of older persons to heart disease. In addition, several older Patrol members, including retired members, and Dr. David Westhoff, the physician responsible for administering physical exams to Patrol applicants, testified.

Dr. Lind stated that aerobic capacity becomes important whenever a Patrol member engages in physical activity such as chasing a suspect or pushing a car. Aerobic capacity, which refers to an individual's ability to utilize oxygen, depends on the efficiency of the individual's lungs and cardiovascular system. A reduction in aerobic capacity means that the oxygen supply is insufficient, which in turn reduces the ability of the muscles to work without fatigue. When the oxygen supply is insufficient an individual's muscles utilize an emergency reserve, a special metabolism by which the muscles generate their own energy. Using this emergency reserve, however, generates only limited muscular function, rapidly induces fatigue, and requires more time to recover from the exertion.

Dr. Lind explained that sedentary persons, such as the Patrol's members, have a peak aerobic capacity at age twenty when they utilize about 3.5 liters of oxygen per minute. A twenty-year-old will not suffer fatigue while working at an aerobic level of three liters per minute, which is the desired level for someone in a safety organization. However, three liters is the maximum capacity of a forty-five or fifty-

year-old and this individual will suffer some fatigue working at this level. Moreover, fifty percent of the sedentary population at ages forty-five to fifty cannot reach the three liter level without relying on the emergency reserve. By the time Patrol members are age sixty, only ten percent will be able to reach the desired level, including those relying on the emergency reserve. According to Dr. Lind, the data indicates the capacity to do physical work drops off sharply after age sixty.

Generally, an individual loses about ten percent of his aerobic capacity each decade after age twenty; thus, by age sixty, he will have lost approximately thirty-five to forty percent. Although sustained exercise for twenty to thirty minutes three times per week at sixty percent of maximum aerobic capacity can increase an individual's capacity, the maximum increase is ten percent. Moreover, interruptions in training such as those caused by illness result in a loss of whatever benefit was gained by exercise.

Thus, as individuals age, physiological changes affect their ability to perform. The body's ability to make efficient use of oxygen declines, with a resulting decline in physical stamina. Dr. Lind also stated that muscle strength, an isometric function, which is involved in pushing, pulling, and carrying, declines as a person ages. In addition, the aging process affects an individual's reaction time, hearing, and vision. This manifests itself, for example, in an individual's inability to adapt to sudden changes in lighting, such as the glare from headlights.

Several retired Patrol members candidly admitted that they retired because they could not perform all the duties of the Patrol. Major Closson retired when he could no longer perform routine patrol duty. By retirement age, Captain Schmitt was also finding

it more difficult to travel and to work long hours. Captain Tinnin, who retired at sixty, stated that he could not cope with working the road, chasing escapees, and handling drunks. Lieutenant Burnett retired six months before his sixtieth birthday because he could not face working the long days directing traffic and crowds at football games or inclement winter weather with its attendant accidents and hazardous roads. Lieutenant Wright retired early because his driving ability, reflexes, and night vision had deteriorated considerably. The testimony of each of these individuals supported Dr. Lind's conclusions. *Compare Hoefelman*, 718 F.2d at 285-86 (plaintiff Hoefelman conceded that pilots over the age of sixty should not be allowed to fly low-level missions).

Coronary heart disease, according to Dr. Antlitz, offers another potential problem for older Patrol members.[6] Although age does not cause coronary heart disease, the data reveals an increase in the number of initial discoveries of coronary heart disease as age increases. The average number of discoveries for the general population for persons thirty

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[6] In discussing medical problems concerning the heart, Dr. Antlitz distinguished among several different terms. A myocardial infarction involves the death of an area of the heart muscle. Coronary artery disease refers to the narrowing of a blood vessel in the heart area. Two symptoms or related problems of coronary artery disease are angina pectoris and coronary insufficiency. Angina pectoris refers to pain resulting from the lack of blood flow to an area of the heart because of some sort of stress; it does not result in the death of tissue. Coronary insufficiency also involves insufficient blood flow to the heart but is not accompanied by pain. It can result in arrhythmias such as irregular heartbeats and quivering of the heart muscle and, in times of stress, in sudden death.

to thirty-nine is four per thousand. It is ten per thousand by age fifty and twenty per thousand by age sixty—a rate five times higher than that for persons thirty to thirty-nine.[7] Latent coronary heart disease presents the danger that, in times of stress, such as sudden exertion in cold weather or during a confrontation, the Patrol member's adrenline response may push him into total body collapse from fatigue or may cause a heart attack.

There is no single test or battery of tests that safely measures a Patrol member's ability to perform his duties and that identifies, with reasonable accuracy, the presence of coronary artery disease. Dr. Antlitz testified that testing an asymptomatic population such as the Patrol will yield as many false positives of cardiac disease as false negatives.[8] Laboratory tests cannot recreate safely the stressful, sometimes life-threatening, situations in which the Patrol members work. The Patrol member will know that a test cannot be truly life-threatening. Some tests that might be used, such as pushing a car on a very cold day, carry unacceptably high risks of physical harm to the officers being tested. Preparation of the individual to be examined can also affect the reliability of testing. For example, persons who resume taking their blood pressure medication shortly before an examination may show a satisfactory blood pressure level on the day of the examination even

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[7] The District Court's incorrect interpretations of his evidence are discussed *infra* at notes 10-11 and accompanying text.

[8] Testing a symptomatic population such as those complaining of angina or chest pain will detect seventy to eighty-five percent of those who actually have coronary heart disease.

though they have not been taking the medication regularly.

The treadmill or stress test often is used to detect the presence of coronary artery disease. Although it is a helpful diagnostic tool, it cannot detect coronary artery disease with complete accuracy. The test results suffer from problems of physician interpretation, which requires subjective assessment of the individual's performance. For example, if a person reaches only seventy percent of his predicted maximum heart rate, the result may be considered borderline normal. Either coronary artery disease or some other disease may have affected the result. The test, as Dr. Westhoff noted, deals only with an average predictable response. Persons with coronary artery disease may have normal stress test results. Dr. Westhoff, for example, described one of his patients who wanted to participate in a physical fitness program. Although the patient went through screening studies, including a stress test, and came out with normal scores, the patient suffered a heart attack while doing calisthenics on the second day of his physical fitness program.

The Patrol generally disputes the efficacy of tests in measuring the physical qualities needed by Patrol members such as endurance, strength, ability, balance, flexibility, and speed. Similar problems of patient preparation, physician interpretation, and duplication of field demands affect these test results. Duplication of field demands involves more than the Patrol member's mechanical ability to handle a suspect that may be out to kill him. It involves tensions arising from fear and from distractions such as repeated glare and loss of light. Testing also presents problems of arbitrariness in determining what par-

ticular result is a "passing" one which determines that the Patrol member can do the job.[9]

Although the District Court discounted the Patrol's expert evidence as "not persuasive" and "often contradictory," 555 F.Supp. at 104, we find this conclusion wholly unsupported by the record. For example, the District Court concluded that "[a]ccording to [Dr. Lind], an averge 45-year-old adult male who is sedentary does not have sufficient aerobic capacity to perform the duties of the Patrol." *Id.* In fact, Dr. Lind testified that at least fifty percent of the sedentary population can perform at age forty-five or fifty at the desired maximum aerobic capacity. The other half must utilize the emergency muscular function which induces rapid fatigue.[10] Dr. Lind fur-

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[9] One of the endurance tests advocated by a witness for the plaintiffs requires the subject to sit in a "V" with his feet off the floor for 60 seconds. The Patrol argues that such a test in no way duplicates the endurance needed for the demands of the Patrol. "[T]he Patrol . . . 'tests' its member's endurance by sending them out on manhunts for 17-18 hour days, under miserable climatic conditions, without adequate preparation or rest." Brief for Patrol at 40. Moreover, as the Patrol asserts, the "V" test exemplifies the arbitrariness of such tests and the problems of interpreting what constitutes a "passing" grade: Shall the Patrol immediately fire members who can sit in a "V" for only 58 seconds? 45 seconds? *Id.* at 40-41.

[10] The District Court criticized Dr. Lind's testimony as "overly generalized" and "not factually based on the duties of patrolmen." 555 F.Supp. at 104. The record does not support the District Court's view of this witness's testimony. Dr. Lind carefully explained that aerobic capacity was important to Patrol members' ability to act efficiently, that is, without severe fatigue. He also explained that they fall within the sedentary classification because, as a group, they do not engage in regular, vigorous, and sustained exercise. Even if

ther testified that by age sixty, ninety percent, or substantially all, Patrol members are unable to perform all their duties safely and efficiently.

The District Court criticized the Patrol for not requiring its members to undergo regular physical examinations and for not attempting "to test its members in accordance with the advice of its own experts." *Id.* at 105. In so doing the District Court ignored the testimony of the Patrol's expert witnesses as to the inadequacy of physical examinations and testing as methods of distinguishing between qualified and unqualified individuals over the age of sixty.

The District Court also erroneously emphasized the fact that the Patrol does not require its members to participate in a regular physical fitness program. *Id.* at 106. The Patrol showed that it would be impractical to force its members to participate in a regular program at a central location. It is inconvenient for members who travel or who are stationed in rural areas to come to a central location. Such a program also leaves some areas without Patrol protection. Moreover, the relevance of a physical fitness program to the issues in this case is questionable. The District Court's digression into this subject reflects concern

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they did, the benefits would be minimal. *See supra* p. 452. Based on his knowledge of the Patrol members' activities, and his own studies of the comparable duties in firefighting. Dr. Lind testified on the desired aerobic capacity for Patrol members.

We also find the District Court's criticism of Dr. Westhoff's testimony as "self serving," *see* 555 F. Supp. at 105 n. 1, an unjustifiable conclusion on credibility. The experts on *both* sides had conceded that they were advocates of their respective positions. Dr. Westhoff's testimony was based on his personal experiences as a treating physician. It also was consistent with the testimony of Dr. Lind and Dr. Antlitz.

with the subjective motivations for the Patrol's policies. The *Tamiami* test, however, focuses on objective evidence, in support of the BFOQ. The test also does not evaluate the age restrictions in terms of an ideal employee. It simply requires objective evidence on whether the older employees can perform their duties or on whether there is a practical way to differentiate among employees other than age. As the Patrol suggests, "[t]he district court . . . appears to base its decision invalidating the bfoq, on what it considers a 60 year old patrolman *could* be, if only 'remade' as the District Court sees fit." Reply Brief for Patrol at 2. The ADEA does not require so draconian an approach.

The District Court dismissed the Patrol's evidence on the greater likelihood of coronary artery disease in older persons as "minimal." 555 F.Supp. at 104. But the District Court appears to have misunderstood the testimony. For example, the District Court found that "[o]nly .4% of the population develops symptoms of coronary artery disease by age 30, only 1% develops symptoms by age 50, and only 2% by age 60." *Id.* at 101.[11] The Patrol's experts actually testified that these statistics represented new discoveries of coronary artery disease in the general population and not the overall incidence of coronary artery disease. Transcript at 613-14. The significance of this data is that it reveals that, regardless of low, average, or high risk categorization, there is an increased incidence of coronary artery disease in the

[11] Elsewhere in its opinion, the court, misinterpreting the same evidence, concluded that "[t]he increase in risk is minimal and is present for members of the Patrol whose ages are in their 30's. The risk peaks for those who are in their 50's at a rate of one percent." 555 F.Supp. at 104. *But see supra* p. 452.

older population. Moreover, according to Dr. Antlitz, cardiovascular disease causes fifty percent of deaths nationwide. Even the plaintiffs' expert witness conceded that age is a factor in assessing the probability that a given person has coronary artery disease. *Id.* at 887-88, 937-38.

The District Court relied heavily on the opinion of the plaintiffs' expert witness, Dr. Stanley Mohler, in concluding that "[w]hen the [treadmill test] is joined with a complete risk factor analysis, physicians can identify nearly every person who is likely to have a heart attack in the following few years." 555 F.Supp. at 101. Dr. Mohler testified that "if [an] individual is clear on all of these factors . . .," including the family history of heart disease, the individual's medical status such as blood pressure and pulse rate, the treadmill test, and blood studies, then "you can determine with a probability of .017 that in the next five years . . . that individual will not have a cardiovascular heart event. . . ." Transcript at 890, 892. This probability, according to Dr. Mohler, "is far less than one in a hundred." *Id.* at 890.[12]

The District Court failed to consider any of the serious deficiencies in Dr. Mohler's testimony. Dr. Mohler's sole explanation as to what he means by "clear on all these factors" is the equally vague description "essentially a normal person." *Id.* at 892. His opinion oversimplifies the complex problem of distinguishing among individuals. He says nothing about whether every variation between individuals can be ranked in order to draw lines fairly among in-

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[12] In fact, a probability of .017 means that 1.7 "normal" individuals per one hundred would have a "cardiovascular heart event." *See generally* W. Curtis, *Statistical Concepts for Attorneys*, 45-57 (1983).

dividuals to determine who is at risk by continuing to do Patrol work. For those individuals who are "normal," Dr. Mohler offers his five-year guarantee. But Dr. Mohler says nothing about the factors which undermine the reliability of testing such as patient preparation, physician interpretation, and the realities of the stressful situations that Patrol members encounter in performing their jobs. The medical profession can approach the problem of the likelihood of coronary artery disease by categorizing individuals according to risk factors. But, as the Patrol's experts pointed out, it still cannot tell us which individuals actually will contract or have contracted the disease and which individuals will suffer sudden cardiac attack. Dr. Mohler's guarantee reflects only probabilities at best and is not a practical means of determining the individual susceptability of Patrol members to coronary artery disease.[13]

In summary, the Patrol has established that there is a factual basis for believing that substantially all Patrol members over the age of sixty lack sufficient aerobic capacity to perform their duties safely and efficiently. The Patrol also has established the inefficacy of testing as an alternative to age, as a means of distinguishing among individuals over sixty. Chronological age may be a poor predictor of physical ability and of the existence of coronary artery disease and other manifestations of arteriosclerosis. At this time, however, the medical profession, as is evidenced by the disagreements among qualified, respected experts, cannot practically or accurately distinguish between older individuals who can and older individuals who cannot perform safely and efficiently the hazardous and stressful duties that members of

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[13] *Cf. supra* note 8 and accompanying text.

the Patrol must perform. In light of the fact that public safety and lives depend upon the capabilities of Patrol members, and in light of the overwhelming evidence of declining physical ability and increasing coronary risk among persons who have reached the age of sixty, we hold that the Patrol clearly has justified its mandatory retirement age.

We also find it persuasive that Congress, which has chosen to extend the ADEA to states and their political subdivisions, authorizes a general mandatory retirement age of fifty-five for federal law enforcement personnel such as FBI agents, CIA agents, United States Marshals, and Secret Service agents. *See* 5 U.S.C. § 8335(b). In addition, Congress has provided exceptions to this rule including individual exemptions to age sixty and voluntary retirement at age fifty. *Id.* at § 8335(b), § 8336(c). These Congressionally authorized limits are based upon "the determination that [law enforcement officers] should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of . . . occupations calling for the strength and stamina of the young rather than the middle aged." S.Rep. No. 948, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 3698, 3699. *See generally Stewart v. Smith*, 673 F.2d 485 (D.C.Cir. 1982) (analysis of relationship between maximum hiring ages for federal law enforcement personnel and ADEA provisions covering federal employees). We believe that it is no less valid for the State of Missouri to be concerned with the youth and vigor of its law enforcement personnel.

We note that our view of the mandatory retirement age issue finds support in recent decisions of the First and Fourth Circuits. *See Mahoney v. Tra-*

*bucco*, 738 F.2d 35 (1st Cir.1984) (upholding as a BFOQ a mandatory retirement age of fifty for Massachusetts state police); *Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir.1984) (upholding as a BFOQ a mandatory retirement age of fifty-five for City of Baltimore firefighters; mandatory retirement age for federal firefighters a reasonable federal standard against which to compare mandatory retirement age of city firefighters).

## IV.

We agree with the District Court that the maximum hiring age of thirty-two for patrolmen is valid under the ADEA. The Patrol established that all ranks are expected to perform duties which are physically and emotionally strenuous. Documentary evidence showed that the average age of patrolmen is 27.5, of corporals 39.6, and of sergeants 45.7. Patrolmen, corporals, and sergeants spend the most time working the road and make the greatest number of arrests. Based on the evidence in the record, the District Court correctly found that it takes about five years of experience before patrolmen become proficient road officers.

The maximum entry age insures that the Patrol can take advantage of the physical skills and abilities of younger persons and also provide those persons with enough experience while they are relatively young to compensate for the inevitable reduction in their physical skills and abilities that comes with aging. The Patrol's experts testified on the effects of aging, on the statistical correlation between age and coronary artery disease, and on the inadequacy of testing as a means of distinguishing among individuals. A lifting of the maximum hiring age would

result in more older members in the lower ranks, which as indicated above, spend a large proportion of their time on the road and make the greatest number of arrests. The safety of both Patrol members and the public would be in greater jeopardy with less experienced, less physically capable, older members in the lower and middle ranks. In addition, the Patrol explained that it has a policy of systematic promotion through the ranks which fosters good morale by allowing younger members to work toward promotion and to rise through the ranks in a steady progression. As the District Court noted, it takes approximately eleven years for a trooper to gain sufficient experience to serve the Patrol in an administrative capacity. All of these considerations support the conclusion that the maximum hiring age for Patrol members is a BFOQ. *See Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C.Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982); *cf. Stewart v. Smith*, 673 F.2d 485.

V.

The District Court based its ruling that the Patrol had failed to establish that its maximum hiring age of thirty-two is a BFOQ for radio operators on a finding that the Patrol had not shown "that substantially all persons over age 40 are unable to safely and efficiently perform the duties of a radio operator or that some persons over the age of 40 possess traits precluding safe and efficient performance unascertainable other than through knowledge of that person's age." 555 F.Supp. at 106. The District Court reasoned that the Patrol could rely upon testing to screen out applicants lacking the traits a radio operator must possess. *Id.*

The District Court ignored, however, the Patrol's strong showing, similar to the showing made regarding the maximum hiring age of thirty-two for troopers, that years of training are required to bring a radio operator in the Patrol to full proficiency, that radio communications are essential to the proper functioning of the Patrol; that in emergency situations lives may depend upon the ability and experience of the radio operator on duty, that the safest and most efficient older radio operator is one with extensive experience in working under the unique conditions of the Patrol and serving its particular needs, and that qualification for promotion to supervisory and administrative levels requires many years of service in the Patrol. The District Court also overlooked the Patrol's showing that although hearing and vision can be tested, it is impossible for any test to recreate the noisy, hectic, and extremely stressful conditions under which its radio operators daily perform their critical tasks.

We find the Patrol's evidence highly persuasive. Further, from our review of the record we are unfavorably impressed by the plaintiffs' efforts, which at best can be described as minimal, to rebut the Patrol's convincing showing that the age thirty-two hiring cap is a BFOQ. In addition, we are mindful that the Patrol is a para-military organization whose pre-eminent concern is to provide for public safety, that we are dealing with a policy decision made by the legislature of a sovereign state, and that the legislative determination is entitled to some deference. Indeed, in our judgment the state must be accorded considerable discretion in determining the manner in which its law enforcement agencies may perform their vital functions most safely and

efficiently. *See EEOC v. City of St. Paul*, 671 F.2d 1162, 1167. *Cf. Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101; *Tamiami*, 531 F.2d 224, 236 n. 30. Accordingly, we reverse as clearly erroneous the District Court's conclusion that the maximum is invalid under the ADEA.

VI.

For the reasons set forth above, we reverse the District Court's rulings that (1) the mandatory retirement age for members of the Patrol violates the ADEA and (2) the maximum hiring age for radio operators violates the ADEA. We affirm the District Court's ruling that the maximum hiring age for troopers does not violate the ADEA. If any claim is still pending regarding back pay for Sergeant Hightower, we direct the District Court to dismiss it.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

For the reasons discussed below, I agree that the district court's finding that age is a bona fide occupational qualification (BFOQ) for hiring state highway patrol troopers is not clearly erroneous and concur in that part of the majority opinion. I do not agree, however, that the district court's findings that age is not a BFOQ for retirement or for hiring radio operators are clearly erroneous and would affirm. Therefore, I respectfully dissent from those parts of the majority opinion.

First, *EEOC v. City of St. Paul*, 671 F.2d 1162, 1167 (8th Cir.1982), as cited by the majority opinion, at 450, states that a legislative declaration that age is a BFOQ is entitled to "considerable deference." Although it is somewhat difficult to reconcile that statement with the discussion immediately following that government employers and private employers

should not be treated differently with respect to proof that age is a BFOQ, 671 F.2d at 1167. I would argue that, regardless of the evidentiary significance which may be accorded legislative declarations in other contexts, such deference does not reduce the state's burden, as the employer, of proving that age is a BFOQ for state highway patrol troopers. *Id.*

In addition, I do not agree that the fact that Congress has established a mandatory retirement age of 55 for *federal* law enforcement personnel, 5 U.S.C. § 8335(b), or has authorized the establishment of maximum hiring ages for federal law enforcement personnel, *id.* § 3307(d); *see Stewart v. Smith*, 218 U.S.App.D.C. 94, 673 F.2d 485 (1982) (holding that mandatory employment limits based upon age for federal employees are not subject to the strict requirements of the ADEA and need only be rationally related to a permissible government objective), is persuasive. A similar argument was rejected in *EEOC v. Wyoming*, 460 U.S. 226, 242-43 n. 17, 103 S.Ct. 1054, 1064, n. 17, 75 L.Ed.2d 18 (1983):

> Even if the minimal character of the federal intrusion in this case did not lead us to hold that the ADEA survives the third prong of the *Hodel* [*v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 1981),] inquiry, it might still, when measured against the well-defined federal interest in the legislation, require us to find that the nature of that interest "justifies state submission." We note, incidentally, that the federal interest underlying the Act is not negated by the fact that the Federal Government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted a federal interest, and once it has asserted the strength

> of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.

*See Johnson v. Mayor & City of Baltimore*, 731 F.2d 209, 218 (4th Cir.1984) (Winter, C.J., dissenting); *EEAC v. County of Los Angeles*, 706 F.2d 1039, 1041-42 (9th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

I also find of limited relevance characterization of the state highway patrol as a paramilitary organization with public safety responsibility. *See* at 457; *Mahoney v. Trabucco*, 738 F.2d 35, 38 (1st Cir.1984) (state highway patrol characterized as paramilitary organization). The public safety responsibility of state highway patrol troopers is relevant only to the second part of the BFOQ test as set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir.1976), and later adopted by this circuit, *e.g.*, *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451(1977), that is, whether the age restriction is reasonably necessary to the essential operation of the business.

As noted in *Stewart v. Smith*, 673 F.2d at 491 n. 26, the BFOQ "standard is highly sensitive to the factual record in individual cases." Here, the district court, as is typical of these cases, made specific findings of fact on the basis of contradictory evidence, much of which was contradictory expert testimony. The district court found that the state failed to prove that mandatory retirement at age 60 was a BFOQ for state highway patrol troopers, *EEOC v. Missouri*

*State Highway Patrol*, 555 F.Supp. 97, 104 (W.D. Mo.1982), or that 32 as a maximum hiring age was a BFOQ for radio operators, *id.* at 106, but that the state did prove that 32 as a maximum hiring age was a BFOQ for troopers, *id.* The district court specifically found that the state failed to satisfy the first, or factual basis, part of the BFOQ test because it failed to show either that substantially all of the state highway patrol officers over 60 are unable to perform their duties safely or effectively or that some persons over 60 possess traits which preclude safe and effective performance and which are impossible or impracticable to ascertain other than on the basis of age. *Id.* at 104. The district court made similar findings with respect to the radio operators, *see id.* at 106. The district court also expressly found that tests can determine with great accuracy an individual's ability to perfrom his or her duties safely and effectively. *Id.* at 104, 106. Because I cannot conclude that the district court's findings are clearly erroneous, I would affirm the judgment of the district court.

Finally, I would emphasize that the ADEA does not prevent the state from assuring that all state highway patrol officers are physically fit or psychologically prepared to perform their duties. The state may still assess the fitness of its state highway patrol officers and job applicants and may refuse to hire or even dismiss those who are unfit. However, the ADEA "requires the State to achieve its goals in a more individualized and careful matter than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC v. Wyoming*, 460 U.S. at 239, 103 S.Ct. at 1062 (citations omitted).

**APPENDIX B**

UNITED STATES DISTRICT COURT
W.D. MISSOURI, C.D.

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Nos. 82-4129-CV-C-5, 81-4135-CV-C-5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

*v.*

MISSOURI STATE HIGHWAY PATROL, ET AL.,
DEFENDANTS

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CALVIN PRICE, PLAINTIFF

*v.*

ALAN S. WHITMER, ET AL., DEFENDANTS

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Dec. 22, 1982

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ORDER AND MEMORANDUM

SCOTT O. WRIGHT, District Judge.

This is a consolidated action brought by the Equal Employment Opportunity Commission ("EEOC") and Calvin Price, a lieutenant in the Missouri State Highway Patrol ("Patrol"), against all of the defendants under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. The

EEOC challenges the defendants' maximum hiring age of 32 for troopers and radio operators and the defendants' mandatory retirement age of 60 for all uniformed members of the Patrol. Price challenges only the mandatory retirement age. A bench trial was conducted during the week of November 7, 1982. The parties have submitted exhaustive proposed findings of facts and conclusions of law, and excellent briefs. After a thorough review of the evidence introduced at trial and the parties' briefs, the Court finds, for the following reasons, that the mandatory retirement age of 60 for all uniformed members of the Patrol violates the ADEA, that the maximum hiring age of 32 for radio operators violates the ADEA, and that the maximum hiring age of 32 for troopers is valid.

## I. FINDINGS OF FACT

1. Plaintiff EEOC is an agency of the United States charged with the administration, interpretation and enforcement of the ADEA, and is expressly authorized to bring an age discrimination action. 29 U.S.C. § 626(b), as amended by Section 2 of the Reorganization Plan No. 1 of 1978, 92 Stat. 3781. Plaintiff Price is a lieutenant in the Missouri State Highway Patrol. Defendant Whitmer, at the time these lawsuits commenced, was the Superintendent of the Patrol. Since August 17, 1982, Howard J. Hoffman has been the Superintendent. Defendant Daniel is the Director of the Department of Public Safety of the State of Missouri. Defendant Missouri Highway and Transportation Commission is a governmental entity with a legal status separate from the State of Missouri and is responsible for the payment of salaries to the members of the Patrol. Defendant Brad-

ford was the Commissioner of Administration of the State of Missouri at the time these lawsuits were filed. Since February 10, 1982, John Pelser has been the Commissioner. The State of Missouri and the Patrol have been employers within the meaning of 29 U.S.C. § 630(b) since May 1, 1974.

2. Price joined the Patrol on October 14, 1949. He was promoted to sergeant on June 1, 1962 and to lieutenant on August 1, 1975. On June 9, 1981, he attained the age of 60.

3. Price was advised on January 15, 1981 that if he wished to serve the Patrol beyond the age of 60 he was required to request an extension. He requested an extension on May 6, 1981, but was told by defendant Whitmer on May 18, 1981 that he must retire on July 1, 1981.

4. On June 29, 1981, Price filed an age discrimination charge with the EEOC. During July, 1981, he filed an age discrimination complaint in this Court and simultaneously moved for a temporary restraining order. An injunctive order was issued permitting Price to remain on the Patrol until his case was resolved. In the course of processing Price's charge, the EEOC discovered that the Patrol had a maximum hiring age of 32 for patrolmen and radio operators. The EEOC filed suit on July 7, 1982, challenging the mandatory retirement age and the maximum hiring age restrictions enforced by the Patrol.

A. Mandatory Retirement

5. Section 104.080 of the Revised Statutes of Missouri requires all uniformed members of the Patrol to retire at age 60. Prior to June, 1982, Section 104.080 required all uniformed members of the Patrol to retire at age 65 and vested the Superintendent of the

Patrol with discretion to extend the employment of members of the Patrol whose ages fell between 55 and 65. Since 1945, the Patrol has adhered to a policy of mandatorily retiring all uniformed members at age 60 without regard to a member's health, job responsibilities or job performance. The Superintendent has routinely granted requests for extension to members of the Patrol whose ages fall between 55 and 60 even where those members had serious health problems which restricted their ability to participate in physically strenuous activities. Requests for extensions were only denied in cases where a member could not perform any job.

6. Since 1955, the Patrol has not allowed any uniformed member to remain employed past the age of 60 unless the Missouri legislature was currently considering legislation that would affect a member's retirement benefits. If the legislation became law, the member was permitted to remain on the Patrol past the age of 60 until the legislation took effect. The member was then immediately retired. Where the legislation failed to become law, the member was required to retire at the end of the month in which the legislature adjourned. The purpose of these extensions was solely to allow a Patrol member to obtain any retirement benefits adopted by the legislature. The mandatory retirement age is enforced because of the Patrol's pension plan and not because of an older person's inability to perform.

7. The Patrol's mandatory retirement policy applies equally to all ranks and job classifications. Since 1978, all members of the Patrol who were mandatorily retired held the rank of corporal or above. All but one held the rank of sergeant or above. All of the uniformed members who have been manda-

torily retired at age 60 were rated by their superior officers as fully capable of performing all of the duties of their jobs. Price is able to fully perform his duties as a lieutenant in the Patrol. He is in excellent health and is under no restrictions with respect to the performance of his present Patrol duties.

8. All Patrol members must enforce the laws of Missouri when travelling to and from work, and while on duty in their Patrol cars. While not on duty, they must report crimes and must take appropriate action to prevent a felony in progress, or to prevent serious injury to a person or property. Most members are required to patrol the highways on Memorial Day, the Fourth of July and Labor Day. Some members are exempted for health reasons or for office work needed by the Patrol on those holidays.

9. As the rank of a Patrol member increases the frequency with which members are exposed to physically strenuous or dangerous activities decreases. The Superintendent, and the majors, lieutenants and captains spend the overwhelming majority of their time performing administrative work. Desk sergeants, sergeants who supervise license examiners, and sergeants who supervise vehicle weight inspections spend most of their time performing administrative work. For example, in the first five months of 1982, lieutenants were responsible for only 10 out of 106,937 arrests, or .01%; they were responsible for 102 out of 273,098 arrests, or .04% in 1979; they were responsible for 32 out of 279,648 arrests, or .01% in 1980; and they were responsible for 64 of 287,524 arrests, or .02% in 1981. There may be as many as 46 lieutenants serving on the Patrol. The average captain makes only .04 arrests, .3 warnings and performs .5 service rendered calls per month. There may

be as many as 20 captains serving on the Patrol. The Missouri Department of Corrections permits its prison guards to work beyond the age of 60. Guards past the age of 60 have successfully served on prison emergency squads which quell uprisings within the prison population.

10. Higher ranks are held by the older members of the Patrol. The average member of the Patrol who is between 55 and 59 years of age makes only 4 arrests per month. The average member of the Patrol who is between 20 and 29 years of age makes 40 arrests per month. From 1979 to the present, 67% of the total arrests were made by patrolmen or patrolmen first class, 19% were made by corporals, 13% were made by sergeants, and less than 1% were made by all lieutenants, captains, majors and the Superintendent.

11. The Patrol has no physical fitness program for members after they have graduated from the training academy. The Patrol does not regularly test its members to determine whether they are physically able to perform all of the tasks which might arise during the course of their employment. The Patrol has no weight restrictions. According to the desired weight tables published by the Metropolitan Life Insurance Company, at least 68% of the members of the Patrol are overweight. A greater percentage of members over the age of 40 are overweight than are members under the age of 40. There is no increase in the percentage of overweight members between age 40 and age 59. Sixty-two percent of the patrolmen, patrolmen first class, and corporals are overweight. At least one patrolman is 80 pounds overweight. There are one or more persons in the ranks of patrolman, patrolman first class, corporal, ser-

geant, lieutenant, and captain who are at least 36 pounds overweight. Physical fitness is not used as a criteria for promotion. A regular physical fitness program would save the Patrol money because sick leave and workmen's compensation claims would be reduced. Weight limitations were repealed by the Patrol because no one would enforce them. In the one year when physical exams were conducted, many of the patrolmen discovered health problems about which they were previously unaware.

12. A number of members of the Patrol have suffered heart attacks and have been permitted to return to their regular job duties. Every member of the Patrol who had a heart condition and who applied for an extension of employment between the ages of 55 and 60 was granted an extension. Sergeant J.T. Cassidy suffered a severe heart attack in 1978 and was permitted to return to his job as a zone sergeant. Cassidy's commanding officers reported that he was fully able to perform all the duties required of a sergeant or patrolman. Major Englehard, who has a heart condition, was found by his commanding officer to be able to perform the most physically demanding responsibilities of a major's duties. Captain Cassady, who suffers from arthritis and high blood pressure, was found by his commanding officers to be able to perform the duties of the Director of Construction and Maintenance. Captain Maddox, who has a heart condition, was found to be able to perform his duties as Bureau Director of the Criminal Division. The Patrol attempts to secure desk jobs for those members who develop health problems which interfere with their ability to perform. Sergeant Malinowski, for example, was transferred from a zone sergeant position to a position as a Su-

pervisor of Motor Vehicles after his second heart attack because the Supervisor job is physically less demanding.

13. The Patrol utilizes a vigorous selection process which measures the skills and abilities needed to perform the duties of a patrolman. A patrolman's level of skill and ability could be accurately ascertained through tests administered throughout a patrolman's career. A patrolman's maturity, judgment and ability to deal with people increases with age and experience. A patrolman is trained for approximately eleven years before being asked to serve the Patrol in an administrative capacity.

14. Age alone is not responsible for coronary artery disease and cannot determine a person's risk of a heart attack. There are wide variations in risk among individuals of the same age depending on systolic blood pressure, cholesterol levels and other measurable factors. Many older persons have a lower risk of heart attacks than persons 20-30 years younger. Women have a significantly lower risk of a heart attack than men. Only .4% of the population develops symptoms of coronary artery disease by age 30, only 1% develops symptoms by age 50, and only 2% by age 60.

15. Physicians can determine with reasonable accuracy whether a patrolman can safely perform law enforcement duties. Physical abilities needed to perform the duties of a patrolman can be easily tested at any age without expensive or complicated equipment. When the Bruce Protocol is joined with a complete risk factor analysis, physicians can identify nearly every person who is likely to have a heart attack in the following few years. No member of the Patrol has ever had a heart attack while performing

physically strenuous activities or encountering a psychologically stressful situation.

B. Maximum Hiring Age

16. Section 43.060 of the Revised Statutes of Missouri requires that patrolmen and radio operators of the Patrol not be over the age of 32 at the time they are hired. The Patrol has not hired any person who is over the age of 32 as a patrolman or radio operator since 1945. The Patrol does not allow persons who are age 33 or older to fill out an employment application for a patrolman or radio operator position or to participate in the Patrol's competitive selection process. Persons over the age of 40 are employed as patrolmen and radio operators and are satisfactorily performing their jobs.

17. Radio operators do not carry guns, make arrests, or participate in Patrol activities; they operate and repair radios. The mandatory retirement age for radio operators is 70. Radio operators are sometimes called upon to work long hours and to rotate shifts. The Patrol is able to test the hearing, eyesight and technical skills needed by radio operators. No physical fitness tests are administered to radio operators. The County of Phelps, Missouri has no maximum age for hiring radio operators and has hired an operator who was over 40 years of age.

18. The duties of the entry level job of patrolman involve physically strenuous, psychologically stressful and dangerous activities. Patrolmen unlike higher ranking members, routinely must be able to chase suspects on foot and in vehicles, assist at scenes of accidents, enforce traffic laws, and engage in criminal investigations. They must be mature, possess good judgment and be able to work well with people. They

often work long hours and must rotate from day to night shifts.

19. It takes a Patrolman approximately five years to become a proficient road officer and another six years to acquire the experience to serve the Patrol in an administrative capacity.

C. Retired Patrol Members Seeking Monetary Relief

20. Major Francis Jones was over the age of 60 when he was mandatorily retired by the Patrol. He worked for the Patrol from November 26, 1951 to July 1, 1981. He was fully capable of performing his duties at the time of his retirement and would have continued working. He was in good health at the time of his retirement and is in good health now. He was earning $29,998 per year at the time of his retirement. Had he continued working, he would have received a 10% wage increase in October, 1981. He presently receives a pension of $1,349.00 per month and received a 4% cost of living increase on October 1, 1982.

21. Captain Freddie H. Roam worked for the Patrol from July 1, 1946 until he was mandatorily retired in July, 1981. He was over 60 years old when he retired. Captain Roam had had a heart attack in 1967 and eventually returned to work. Shortly before his retirement, Captain Roam had a quadruple bypass surgery for his heart and within two months was healthier than he had been while working for the Patrol. He was fully capable of performing the duties of his job at the time of retirement and would have continued to work. He is presently more capable of performing his job than he was when he was working for the Patrol. At the time of his retirement he was earning $28,300.20 annually. His pension is cur-

rently $14,344.97 annually. He received a 4% cost of living increase on October 1, 1982.

22. Sergeant David Walker was over 60 years old when he was mandatorily retired from the Missouri State Highway Patrol. He had worked for the Patrol from July 1, 1946 to July 1, 1981. Walker was fully capable of performing all of his job duties as desk sergeant at the time of his retirement, and if permitted, would have worked to age 62. He was earning $2,300 per month at the time of his retirement and would have received a 10% longevity increase had he continued. He was in good health at the time he retired and is in good health now. He had held no jobs since his retirement from the Patrol but has been receiving a pension. The pension is presently $1,370 per month. He received a 4% cost of living increase on October 1, 1982 and a 5% cost of living increase on October 1, 1981.

23. Captain Norman E. Tinnin was mandatorily retired from the Missouri State Highway Patrol as of July 1, 1982. He had turned 60 on June 2, 1982. He was capable of performing his job at the time he retired and is still capable of doing so. At the time of his retirement he was earning $2,537.60 per month. He has no interim earnings. He is drawing a pension from the Patrol. At the time of his retirement he was given a final evaluation. He was rated excellent—the highest possible rating—in job knowledge, judgment, attitude, dependability, creativity, and personal efficiency, and ability to organize, to delegate authority and to deal with people.

24. Sergeant Lloyd Roberts worked for the Patrol for 28 years and 7 months. He retired on May 1, 1982 at age 55. He retired because he was informed that he would be transferred from zone ser-

geant to desk sergeant. His replacement as zone sergeant was 39 years old. Roberts testified that at the time of his retirement he was fully capable of performing his job. Colonel Hoffman testified that the Patrol had only 3 zone sergeants over the age of 55. Roberts enjoyed his job as zone sergeant and did not want to sit at a desk while he still enjoyed outdoor work. Were it not for the mandatory retirement at age of 60 and the Patrol's knowledge that Roberts would work only 5 more years, he would not have been transferred to desk duty. Roberts' last monthly salary prior to retirement was approximately $2,440. He has had earnings since his retirement of approximately $850 per month. His pension from the Patrol is $1,362.55 per month.

25. Lieutenant Colonel Ernest W. Van Winkle was mandatorily retired by the Patrol on July 1, 1980 at the age of 60. Lt. Colonel Van Winkle would have continued working for 2½ years if it had not been for the Patrol's mandatory retirement policy. He was in good health at the time of his retirement and was fully capable of performing all of the duties of his job of Assistant Superintendent. His salary at the time of retirement was $2,795.20 per month. Colonel Van Winkle's pension is currently $1,395.40 per month. He received one 4% cost of living adjustment on October 1, 1982, and two 5% cost of living adjustments on October 1 of each of the two prior years. He does not have any interim earnings. He is still in good health and fully capable of performing the duties of his former job. He does not want his job back at this time.

26. Major Albert F. Closson was mandatorily retired by the Patrol on August 31, 1979 at the age of 60½. Major Closson would have continued work-

ing until he reached the age of 62 if it had not been for the Patrol's mandatory retirement policy. He was in good health and capable of performing all the duties of his job as Chief of Staff at the time of his retirement and at age 62. His salary at the time of retirement was $2,480 per month. His current pension is $1,400 per month. He received a 4% cost of living increase on October 1, 1982 and a 5% cost of living increase on October 1, 1981 and October 1, 1980. His interim earnings are $4,200 for the period August 31, 1979 to February 9, 1981.

27. Sergeant James W. Colvin was mandatorily retired on February 28, 1981 at the age of 60 and 2 months. Sergeant Colvin would have continued working until June 1, 1982 if he had been permitted to do so. He was in good health and fully capable of performing the duties of his job as a desk sergeant at the time he retired. His salary at the time of retirement was $2,136 per month. His pension for the period February 28, 1981 to June 1, 1982 was $823 per month. He has no interim earnings.

28. Sergeant Eugene D. Hancock was retired in September of 1981, four months prior to his 60th birthday because he was being transferred from his job as Supervisor of Vehicle Weight Inspectors to the job of desk sergeant and was being replaced by a younger person. At the time of his retirement, he was in good health and was fully capable of performing all of the duties of his job. He would have continued working up to the present time if he had not been transferred to the desk and if the Patrol did not have a mandatory retirement age of 60. His salary at the time of his retirement was $2,400 per month. He presently receives a pension. He received a 4% cost of living increase on October 1, 1982. He

has no interim earnings. He does not want his job back at this time.

29. Lt. Richard Burnett retired on September 1, 1981, retired at age 59½ because he could get a 4% cost of living increase in his pension by retiring early and because he knew he was going to have to retire at age 60. Burnett would have continued working past the age of 60 if it had not been for the defendants' mandatory retirement policy. He was in good health and was fully capable of performing the duties of his job as operations lieutenant at the time he retired. Burnett is still in good health. His salary at the time of retirement was $28,000 per year. For the period September 1, 1981 to September 1, 1982, his pension was $1,260.50 per month. For the period September 1, 1982 to the present, his pension has been $1,379.23. Burnett has not had any interim earnings. He is still fully capable of performing the duties of operations lieutenant but he does not want his job back.

30. Sergeant James R. Hightower was mandatorily retired on July 1, 1979 at the age of 60 and 3 months. He would have continued working to age 62 if permitted to do so. He was in good health and fully capable of performing the duties of his job as Supervisor of Drivers License Examiners at the time of his retirement and at the age of 62. His salary at the time of his retirement was $2,160 per month. His pension at the present time is $970 per month. He received a 4% cost of living increase on October 1, 1982 and a 5% cost of living increase on October 1, 1980 and October 1, 1981. He had no interim earnings.

## II. CONCLUSIONS OF LAW

The ADEA, enacted in 1967, prohibits age discrimination against persons aged 40 through 60. Pub.L. No. 90-202, §§ 4, 12, 81 Stat. 602, 603, 607. It was amended in 1974 to apply to state and local governments. Pub.L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74. The legislative history manifests a Congressional intent to require employment decisions to be made on the basis of ability rather than age. 29 U.S.C. § 621(b). *See* H.R.Rep. No. 805, 90th Cong., 1st Sess.; S.Rep. No. 723, 90th Cong., 1st Sess. 1, U.S.Code Cong. & Admin.News 1967, p. 2213. The ADEA permits otherwise unlawful discrimination, however, where age is a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business. 29 U.S.C. § 623(f)(1).

The defendants have admitted that they will not hire persons over the age of 32 to be troopers or radio operators and will mandatorily retire patrolmen over the age of 60. These policies are *per se* violations of the ADEA. *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1977); *Hoefelman v. Conservation Commission of Missouri Dept. of Conservation*, 541 F. Supp. 272, 274 (W.D. Mo. 1982). Since a *per se* violation is admitted, the defendants must demonstrate that the arbitrary age restrictions are BFOQs which are reasonably necessary to the normal operation of the Patrol.

In order to establish a BFOQ, the defendants must establish a factual basis for believing either (1) that substantially all of the patrolmen over age 60 and substantially applicants for trooper and radio opera-

tor positions over age 40 are unable to perform their duties safely and efficiently, or (2) that some older patrolmen or applicants process traits precluding safe and efficient job performance unascertainable other than through knowledge of the patrolmen's or applicants' ages. *EEOC v. City of St. Paul, supra,* at 1166. The defendants contend that their proof satisfies either prong when applied to their minimum hiring age and mandatory retirement age rules. They additionally contend that the age restrictions are proper because they protect the Patrol's lucrative retirement benefits, promote morale and ensure advancement opportunities.

A. *Mandatory Retirement Rule.*

The defendants have failed to prove that their mandatory retirement age of 60 is a BFOQ for members of the Patrol. Their evidence does not show that substantially all persons over age 60 are unable to safely and efficiently perform the duties of a patrolman, or that some persons over age 60 possess traits precluding safe and efficient performance unascertainable other than through knowledge of the patrolman's age. The testimony of their experts was not persuasive and was often contradictory.

The physiologist who testified for the defendants stated that aerobic capacity (the ability to use oxygen) is needed by members of the Patrol and decreases with age. According to the physiologist, an average 45-year-old adult male who is sendentary does not have sufficient aerobic capacity to perform the duties of the Patrol. Though the physiologist's conclusion is overly generalized and was not factually based on the duties of patrolmen the Patrol does not even heed its expert's advice. The Patrol has

routinely and successfully allowed patrolmen to work up to the age of 60. Members of the Patrol are not taken off road duty at age 45. And though all of the factors about which the physiologist testified—aerobic capacity adaptability to heat, strength, endurance, vision and hearing—can be tested, the Patrol has not undertaken to measure the abilities of its members with respect to those factors.

The defendant's expert cardiologist testified that the risk of coronary artery disease increases with age. The increase in risk is minimal and is present for members of the Patrol whose ages are in their 30's. The risk peaks for those who are in their 50's at a rate of one percent. The genuineness of the Patrol's concern about the increased risk of coronary heart disease is questionable, however, since the Patrol has placed members who have had heart attacks in road-working jobs and has not exempted older members of the Patrol from road work.

Given the wide variations in risks among people of the same age and between men and women, age alone is a poor predictor of coronary artery disease. The risk of having a heart attack is better predicted when additional indicators such as aerobic capacity, blood pressure, and obesity are known. The Patrol however, does not require its members to undergo regular physical examinations and has not attempted to test its members in accordance with the advice of its own experts.[1]

The rebuttal evidence offered by the EEOC established that persons who are 60 years of age or older

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[1] The defendants also offered expert testimony from a local internist. The internist's testimony was extremely self-serving, since many patrolmen are his personal patients, and was not based on any recent scholarship. This Court has given it little credence.

can perform the duties of the Patrol and that age alone is a poor predictor of a person's ability to perform safely and efficiently. The EEOC's medical expert stated that three elements must be present if a member of the Patrol is to be expected to perform well. A member of the Patrol must be free from impairing diseases, be able to perfrom and be motivated to perform. Because of the advances in the medical knowledge concerning the normal aging process, a distinction can be drawn between physical changes which can be associated solely with the aging process and those which are associated with disease and self-abuse. Physicians are able to determine with reasonable accuracy whether a member of the Patrol is able to perform his or her duties.[2] A patrolman's

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[2] The expert who offered this testimony, Dr. Stanley R. Mohler, testified by way of deposition in another age discrimination case ruled by this Court. *See Hoefelman v. Conservation Comm'n of Missouri Dept. of Conservation,* 541 F.Supp. 272, 273 n. 1 (W.D.Mo. 1982). In *Hoefelman,* this Court credited another expert. The *Hoefelman* case is distinguishable on several grounds. First, Dr. Mohler's deposition testimony was incomplete. No studies were cited or discussed in the deposition. The plaintiff in *Hoefelman* did not go to the expense of calling Dr. Mohler as an expert so that he might elaborate on his brief deposition testimony. His live testimony in the case-at-bar was extremely enlightening and persuasive.

Second, Mr. Hoefelman had not been forced to retire. He was merely transferred within the Department of Conservation. By his own admission, he stated that he should not engage in low-level flying beyond the age of 60 because of slowed reaction time and increased fatigue. *Id.* at 273. He was bound by his own admission.

Finally, the Court observed in *Hoefelman* that it was not closing its doors to new knowledge. *Id.* at 275. The Court must decide age discrimination cases based on the facts which

functional age, rather than chronological age, is a better determinant of his or her ability to perfrom. Two patrolmen of the same chronological age can have a widely divergent functional age, and thus a widely divergent ability to perform, if one is diseased or self-abused while the other is neither.

The physical abilities needed to perform law enforcement duties are easily tested. The EEOC's expert exercise physiologist demonstrated many simple and inexpensive tests which can quickly assess a patrolman's balance, flexibility, agility, speed, power and endurance. If the Patrol is genuinely concerned about the well-being of the public and its officers, it can readily evaluate its members and discharge those who cannot perform up to standard.

The defendants' claim that the mandatory retirement age must remain in effect to protect the Patrol's lucrative retirement benefits is not a proper defense and is based wholly on speculation. While it is true that the Patrol's retirement benefits are much better than those of other state employees, and that other state employes would like to be awarded similar benefits, there was no evidence which showed that those benefits would be curtailed if the mandatory retirement age of 60 was overturned. There was no evidence that the State of Missouri would not continue to reward the members of the Patrol for their service. In fact, the benefits can presently be withdrawn from the Patrol at any time. The problem of retirement benefits is a political question which the Patrol will be free to address in another forum.

Similarly, the defendants' claim that the mandatory retirement age promotes morale and ensures

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are presented to it. In the case-at-bar, the defendants simply failed to carry their burden of persuasion on their BFOQ defense.

opportunities for advancement is without merit. The Patrol claims that a regular physical fitness program would hurt morale; yet the Patrol claims that its members must be physically fit in order to protect the public. If the Court accepts the Patrol's reasoning, it must conclude that the public is best served when the Patrol's morale is lowest. Members of the Patrol begin their carers highly motivated and in excellent physical shape. The academy training fosters high morale. It is within the capacity of the Patrol to keep morale high by maintaing the successful training programs throughout a patrolman's career. The Patrol is able to control the level of its morale. If the Patrol retires those who are no longer fit to serve the public at the age they become unfit, advancement opportunities will arise.

B. *Maximum Hiring Age*

1. Radio Operators.

The defendants failed to prove that their maximum hiring age of 32 is a BFOQ for radio operators. They did not show that substantially all persons over age 40 are unable to safely and efficiently perform the duties of a radio operator or that some persons over the age of 40 possess traits precluding safe and efficient performance unascertainable other than through knowledge of that person's age. The duties of radio operators include repairing and installing equipment, hearing and transmitting information, typing, and, in some instances, climbing radio towers. The Patrol presently employs persons over the age of 40 who capably perform all of these duties. The Director of Radio Operations for the Patrol testified that persons over the age of 40 are able to master the skills necessary to perform the radio operator duties.

Section 43.060 of the Revised Statutes of Missouri, which requires the Patrol to turn away applicants who are over the age of 32, does not make any exceptions for persons who may have many years of radio operator experience. For example, a 33-year-old person with 13 years of experience with another state highway patrol cannot be considered for the radio operator's position.

Though the defendants suggested that hearing and vision generally decline with age, they offered no medical evidence which showed when the decline occurs. All of the traits which a radio operator must possess can be readily tested by the Patrol. The Patrol periodically tests the ability of radio operators to hear, see and master technical skills. The Patrol can easily base decisions to hire radio operators on these criteria since the tests have been developed and are presently in use.

2. Troopers.

The defendants have proved that their maximum hiring age of 32 is a BFOQ for troopers. The troopers spend almost all of their time doing road work. Though the Patrol requires all of its members to be able to perform all the strenuous physical activities which a trooper encounters daily, the evidence clearly demonstrated that the higher ranking members of the Patrol spend almost all of their time doing administrative work.

The safest patrolman is one who has acquired several years of experience. An experienced patrolman is best able to protect the public and serve as an administrator. It takes approximately eleven years for a trooper to gain sufficient experience to serve the Patrol in an administrative capacity. Thus, the maximum hiring age requirement of 32 for troopers

is a BFOQ. *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C.Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982).

## III. RELIEF

Several former members of the Patrol testified that they would have remained on the Patrol if they had not been forced to retire, but that they do not want to be reinstated. The parties agreed not to undertake the computation of the monetary damages of these retired members of the Patrol until after the resolution of the liability issues. The parties should, therefore, submit their respective calculations with regard to the proper measure of damages.

## IV.

Accordingly, it is hereby

ORDERED that judgment be entered in favor of plaintiff Price and that the defendants bear the costs of Price's action. It is further

ORDERED that judgment be entered in favor of the EEOC on the maximum hiring age claim of radio operators and mandatory retirement age claim and in favor of the defendants on the maximum hiring age claim of troopers. Defendants should bear two-thirds of the costs of the EEOC action. The EEOC should bear one-third. It is further

ORDERED that the parties separately submit their respective calculations on the proper measure of damages to be awarded to retired members of the Patrol who claimed damages within twenty (20) days of the date of this order. It is further

ORDERED that plaintiffs submit their claims for attorneys' fees within twenty (20) days of the date of this order.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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September Term, 1983

No. 83-1287/1850/2636WM

EQUAL EMPLOYMENT OPPORTUNITY COMM., ET AL.,
APPELLEES

*v.*

MISSOURI STATE HIGHWAY PATROL, ET AL.,
APPELLANTS

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Appeal from the United States District Court
for the Western District of Missouri

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JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was urged by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in part and reversed in part in conformity with the opinion of this Court. The district court is further directed to dismiss any pending claim regarding back pay for Sergeant Hightower.

November 12, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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September Term, 1984

Nos. 83-1287/1850-WM

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL., APPELLEES/CROSS APPELLANTS

*v.*

MISSOURI STATE HIGHWAY PATROL,
ET AL., APPELLANTS/CROSS APPELLEES

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Appeals from the United States
District Court for the
Western District of Missouri

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Appellees/cross Appellants' petitions for rehearing en banc have been considered by the Court and are denied.

Judges Heaney, McMillian and Arnold would have granted the petitions.

Petitions for rehearing by the panel are also denied.

January 28, 1985

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No. 84-2004

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CALVIN M. PRICE,

*Petitioners,*

v.

MISSOURI STATE HIGHWAY PATROL and ALAN S. WHITMER, Superintendent, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the appellate court's reference to public safety in its discussion of the *Tamiami* test, is in conflict with applicable authority when the appellate court limited its discussion of safety to that provided for in the *Tamiami* test?

2. Whether the appellate court's decision to reverse the district court on "clearly erroneous" grounds conflicts with any applicable authority?

3. Whether the appellate court's brief reference *in dicta* to federal retirement ages conflicts with *Johnson* v. *Mayor and City Council of Baltimore,* ____U.S.____, (Nos. 84-518 and 84-710 (June 17, 1985), when the court had already determined that the Patrol's mandatory retirement age was a bona fide occupational qualification under the *Tamiami* test?

4. Whether the appellate court failed to consider each rank of the Patrol in its analysis of whether the Patrol's mandatory retirement age is a bona fide occupational qualification?

## TABLE OF CONTENTS

Page

Questions Presented ..... I

Table of Contents ..... II

Table of Authorities ..... III

Statement of the Case ..... 2

Reasons Why the Writ Should be Denied—

The Court of Appeals' discussion of the "safety factor" as it is considered under the *Tamiami* test, is not in conflict with the applicable authority of this or any other federal court, but rather follows well established precedent of this court .... 9

There is no basis for this court to grant the petition for writ of certiorari for the purpose of reviewing the appellate court's decision on petitioner's theory that the court conducted a *de novo* review of the facts, because the Court of Appeals correctly applied the "clearly erroneous" standard ..... 11

This court should refuse to grant the petitioner's request for certiorari on the question of the effect of the federal retirement statute because the appellate court had already determined that the Patrol's mandatory retirement age was a bona fide occupational qualification under the *Tamiami* test, before it even mentioned the federal statute *in dicta*, and thus did not rely on the federal retirement age statute to reach its decision ..... 15

Certiorari should not be granted on the question of whether the appellate court should have analyzed each rank of the Patrol in its bona fide occupational qualification analysis, because, in fact, the appellate court *did* consider every rank of the Patrol in its bona fide occupational qualification determination ..... 17

## TABLE OF AUTHORITIES

Page

*Anderson* v. *City of Bessemer City*, ___ U.S. ___, 105 S.Ct. 1504 (1985) .....15

*Bose Corporation* v. *Consumers Union of United States, Inc.*, ___ U.S. ___, 104 S.Ct. 1949 (1984) .....11

*EEOC* v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) ..17

*Hoefelman* v. *Conservation Commission of the Missouri Department of Conservation*, 541 F.Supp. 272 (W.D. Mo. 1982) .....14

*Houghton* v. *McDonnell Douglas Corporation*, 553 F.2d 561 (8th Cir. 1977) .....10

*Johnson* v. *Mayor and City Council of Baltimore*, ___ U.S. ___, Nos. 84-518 and 84-710 (June 17, 1985) ..16

*United States* v. *Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981), *cert. den'd.*, 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 46, citing *United States* v. *Mississippi Valley Generating Company*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961) .....13

*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) .....11, 15

*Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) .....2, 9

*Western Air Lines* v. *Criswell*, No. 83-1545 (June 17, 1985) .....2, 10, 16

No. 84-2004

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CALVIN M. PRICE,
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v.

MISSOURI STATE HIGHWAY PATROL and ALAN S. WHITMER, Superintendent, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondent, Missouri State Highway Patrol, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 748 F.2d 447 (8th Cir. 1984), and it reversed the judgment and opinion of the United States District Court for the Western District of Missouri, at 555 F.Supp. 97 (W.D. Mo. 1982). Both Calvin Price and the Equal Employment Opportunity Commission have petitioned for writ of certiorari. Respondent consolidates its response to both in this brief.

## STATEMENT OF THE CASE

This is a case brought by Lt. Calvin Price of the Missouri Highway Patrol, consolidated with the suit brought by the Equal Employment Opportunity Commission (EEOC), challenging the respondent's policy of mandatorily retiring all patrolmen at age 60.[1] The Patrol asserted that the mandatory retirement age of 60 is a bona fide occupational qualification for all ranks under the Age Discrimination in Employment Act, 29 U.S.C. sections 621-634 (hereafter ADEA). The Patrol also asserted that under the bona fide occupational qualification test set forth in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-36 (5th Cir. 1976), recently adopted by this court in *Western Air Lines, Inc.* v. *Criswell*, ____U.S.____, (No. 83-1545, June 17, 1985), respondent's mandatory retirement age satisfies both prongs of the *Tamiami* test, and the Eighth Circuit so found.

Respondent asserts that the majority opinion of the Eighth Circuit aptly describes the duties of the Patrol. That opinion sets forth the duties as follows:

The Patrol's main functions are to enforce the traffic laws and to maintain safety on the highway. The Patrol also does criminal work including investigations of burglaries, murders, and other crimes. Patrolmen and corporals spend the most time working the roads and conducting investigations. Higher ranking Patrol members often travel on the road as part of their normal duties or coming to and from work.[2] The Patrol members' obligation to the

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[1] This policy was codified in June 1982, in section 104.080, RSMo Supp. 1984.

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[2] Patrol members' entering rank is that of patrolman or trooper. The upward line of progression in rank is patrolman (or trooper), corporal, sergeant, lieutenant, captain, major, lieutenant colonel, and colonel. Colonel Hoffman, the Superintendent of the Patrol, testified that there are Patrol members over the age of fifty-five in every rank.

public extends to their off-duty hours. At all times, they are expected to enforce the traffic laws and to act when a felony is committed in their presence, when someone's life is in danger, when property is threatened, and when they receive information requiring Patrol attention. All ranks, including those which are primarily administrative, participate in special assignments. For example, the Patrol steps up its policing of the highways on holiday weekends, and the participation of senior officers is required. Other special assignments include riot control, civil disturbances, natural disasters, manhunts for escaped convicts, football game details, and covering important meetings.

A member of the Patrol engages in physically and emotionally strenuous activities. His duties may involve handling verbal and physical resistance from suspects such as violent drunks or fleeing suspects. Apprehending a speeder or a drunk driver may necessitate a chase, during which the Patrol member must drive at high speeds, weave through highway traffic, and call the radio dispatcher. For instance, when Lieutenant Mills, a desk officer, was returning home from work one day, he chased a speeding motorist. After the motorist fled from his car, Mills chased him on foot. When the motorist turned on Mills and pointed a revolver at him, Mills shot and killed the motorist.

If the Patrol member is called to an accident scene, he determines what assistance is needed, such as the immediate removal of victims from cars, applies first aid to victims, and secures the scene from further damage. Patrol members also have the sad duty of informing relatives of the seriously injured or dead. Members of all ranks recounted instances in which they assisted motorists whose vehicles were mechanically disabled or stuck in the snow. To prevent further accidents, Patrol members push cars off the road and remove hazardous objects, such as dead animals, hay bales, tires, and accident debris from the road.

The Patrol's obligations to the public mean that Patrol members of all ranks work the road, handle abusive and violent motorists, engage in high speed chases, assist motorists, and participate in other strenuous field work. Although a Patrol member may call for assistance, emergency situations do not always accord him the luxury of waiting for help.

The Eighth Circuit found that the Patrol's evidence satisfied both prongs of the *Tamiami* test, and that the lower court clearly erred in holding against the Patrol. Though the lower court did not even mention the first prong of the *Tamiami* test, the Eighth Circuit held that the Patrols' evidence established that the mandatory retirement age was reasonably necessary to the essence of the Patrol, safety. In discussing the second prong of the *Tamiami* test, the court held that the Patrol met both alternatives of the test in establishing that all or substantially all persons over 60 would be unable to perform the job safely and efficiently, *and* that there is no practical way to distinguish which persons over 60 can perform the job.

In reviewing the medical evidence presented by both sides, the court noted that the Patrol presented testimony of Drs. Alexander Lind, Albert Antlitz, and David Westhoff. Dr. Lind testified to the effects of age on a person's aerobic capacity. Aerobic capacity depends on the efficiency of the individual's lungs and cardiovascular systems. Dr. Lind testified that aerobic capacity, or the ability to utilize oxygen, is essential whenever a Patrol member engages in physical activity such as chasing a suspect, because without sufficient aerobic capacity, the muscles cannot work without fatique. Dr. Lind testified that only ten percent of Patrol members over 60 can reach the aerobic capacity level necessary to perform the duties of the Patrol, based on numerous studies, and his own research as to the levels necessary to perform public safety occupations.

Several retired Patrol members testified that when they had retired at age 60 or before they could no longer work the long hours, engage in high speed chases, or handle drunks they encountered on the road. Nor could they face another winter with its attendant accidents and hazardous roads. The court noted that this testimony supported Dr. Lind's conclusion.

The Patrol also presented the testimony of Dr. Antlitz, an expert cardiologist who has performed numerous studies on the cardiological effects of age on law enforcement officers. Dr. Antlitz testified, and even petitioner's evidence supported, the fact that all other factors being equal, the "sixties" age group is *five times* as likely to have coronary heart disease as the "thirties" age group. This disease presents the danger that, in times of stress, such as sudden exertion in cold weather or during a confrontation, the Patrol member's adrenaline response may push him in to total body collapse from fatigue or may cause a heart attack.

Dr. Antlitz also testified that there is no single test or battery of tests that safely measure a Patrol member's ability to perform his duties for many reasons. First, testing an asymptomatic population such as the Patrol will yield as many false positives of cardiac disease as false negatives. Second, laboratory tests cannot recreate the unpredictable, stressful, sometimes life-threatening situations in which the Patrol members work. Third, both patient and physician can affect the results of tests such as the treadmill or stress test. The patient may, for a short period, exercise or "prepare" for the test, thereby skewing the results. Or the patient may be suffering from some disease other than heart disease which can affect the results. The physician must then make a subjective determination in evaluating the patient's performance and interpreting the numerical results of these tests.

Dr. Westhoff, the internal medicine specialist who administers physical exams for the Patrol's recruits, testified that on at least two occasions in his office, a complete battery of cardiological tests, including treadmill tests, were given to individuals who received scores indicating they were "normal", yet they had heart attacks within a day of their tests. These were the same tests that plaintiff's expert, Dr. Mohler, testified could tell the Patrol everything they need to know to predict a member's performance.

The Eighth Circuit then proceeded to discuss some examples in which the record itself revealed that the lower court simply misstated the evidence in this case. The lower court, for example, stated that Dr. Lind testified that an average 45 year old male could not perform the duties of the Patrol. The transcript revealed however, that Dr. Lind actually testified that at least fifty percent of the age 45-50 sedentary population group can perform at the desired aerobic capacity. The other half can perform but must utilize the emergency muscular function which induces rapid fatigue.

The Eighth Circuit also noted that the district court erred in its statement that the risk of cardiological disease "is minimal and is present for members of the Patrol whose ages are in their 30's. The risk peaks for those who are in their 50's at a rate of one percent." 555 F.Supp at 104. Dr. Antlitz's actual testimony was that the risk of heart disease is *five times* greater for 60 year olds than 30 year olds (T. 613). Even Dr. Mohler, the plaintiff's expert, reluctantly admitted the risk of heart disease increases five times between age 30 and 60 (T. 887-888, 937-938).

The Eighth Circuit also noted that the lower court was apparently trying to wander from the *Tamiami* standard with its heavy emphasis on how older Patrol members *could* perform if only "remade" as the district court sees fit with

a variety of exercise programs the lower court was impressed with. However, as the Eighth Circuit emphasized, the *Tamiami* test does *not* ask if all or substantially all patrolmen over 60 *could* perform their duties if they were "remade" into ideal physical specimens. It only asks if all or substantially all of them, *taken as they are,* are able to perform their duties. The appellate court held that the lower court clearly did not follow the *Tamiami* test by delving into the subjective motivations of why the Patrol does not "exercise" its members as the lower court sees fit, or attempting to subjectively judge what the Patrol *could* be, if it did. As the Eighth Circuit opined, the ADEA does not require such a draconian approach in determining whether the mandatory retirement age is a bona fide occupational qualification.

The lower court credited the EEOC's expert witness, Dr. Stanley Mohler, an aerospace medicine specialist. Dr. Mohler told the lower court that commercial pilots, as well as highway patrolmen, should be allowed to work through their nineties; that 90 year olds should be admitted as *entering cadets* into the Patrol; that senility is caused by a virus; 80% "of the people" never get senility; and that there is *no* relationship between age and deterioration of hearing, distance vision, strength, coordination, endurance, adaptability to temperature changes, aerobic capacity, obesity, cardiovascular response, tolerance of stress, fatigue threshold, high blood pressure, impairing disease and cardiovascular disease.

Dr. Mohler also testified he can predict with a probability of .017 that in the next five years an individual will not have a cardiovascular heart event by doing a risk factor analysis and combining it with a treadmill test. However, as the Eighth Circuit pointed out, he failed to tie this baffling 5-year guarantee into any prediction as to what this would mean to patrolmen, specifically. His guarantee did

not forecast the likelihood of a patrolman suffering a cardiac event when he encounters the stressful situations a patrolman encounters. Instead, the Eighth Circuit, emphasized, Dr. Mohler told us by passing his test you are merely ordained in Dr. Mohler's words, an "essentially normal person".

The lower court found that the Patrol's mandatory retirement age of 60 was not a bona fide occupational qualification under the ADEA, and the Patrol appealed to the Eighth Circuit, which reversed the lower court on this issue.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I.

**The court of appeals' discussion of the "safety factor" as it is considered under the Tamiami test, is not in conflict with the applicable authority of this or any other federal court, but rather follows well established precedent of this court.**

Petitioners argue that because the Eighth Circuit mentioned the words "public safety" in a paragraph that also discusses medical evidence that somehow this evinces an intent to "relax" the standard of the *Tamiami* test. At the outset, it is important to remember that the second prong of the *Tamiami* test *itself,* speaks in terms of the issue of safety. It holds that an employer satisfies the second prong of the *Tamiami* test if it shows that all or substantially all of the older employees are unable to perform their duties *safely* and efficiently or that some older employees possess traits precluding *safe* and efficient job performance unascertainable other than through knowledge of the employee's age. *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d 224, 235 (5th Cir. 1976). Thus, the ability of the Patrol members to perform their duties, namely protecting the public, in a safe manner is a key element of this "second prong" that *must* be determined by the Court.

Moreover, it is clear that the statement of the Eighth Circuit that petitioners challenge is merely a "summing up" of *both* prongs of the Tamiami test. The full text of that statement reads:

> In light of the fact that public safety and lives depend upon the capabilities of Patrol members, and in light of the overwhelming evidence of declining physical ability and increasing coronary risk among persons who have reached the age of sixty, we hold that the Patrol clearly has justified *its mandatory retirement age.*

[Emphasis added.] *Id.* at 455. Note that the court did *not* conclude this statement by holding that the Patrol only satisfied the second prong of the *Tamiami* test, but that the Patrol had justified the mandatory retirement age. Clearly the court was not discussing the second prong of the *Tamiami* test *alone,* but was referring to the public safety aspect of the first prong, and the medical evidence aspect of the second prong, in reaching the conclusion that the Patrol had justified the mandatory retirement age in its entirety. This analysis, of course, virtually tracks the *Tamiami* test as adopted by this court in *Western Air Lines* v. *Criswell,* No. 83-1545 (June 17, 1985).

The Eighth Circuit is well aware that the public safety factor only affects the burden of proof on the first prong of the *Tamiami* test, and emphasized this in its discussion of the first prong. *Id.* at 450. Its strict adherence to the *Tamiami* test is indisputable. In fact, it has steadfastly applied the *Tamiami* test since 1977 in *Houghton* v. *McDonnell Douglas Corporation,* 553 F.2d 561 (8th Cir. 1977).

Petitioners also appear to argue in the fifth paragraph under their first point that the Eighth Circuit "relaxed" the burden of proof on the *first* prong of the *Tamiami* test. The statement of the Eighth Circuit attacked by petitioners in this instance obviously concludes the Eighth Circuit's discussion of the first prong, and precedes any discussion of the second prong. *Id.* at 451. In this discussion the Eighth Circuit again adhered to the *Tamiami* standard by finding that the Patrol's retirement age was reasonably necessary to the performance of its functions. At no time did the Eighth Circuit deviate from *Tamiami,* and would not even *consider the* Patrol's secondary alternative argument that they should abandon the *Tamiami* test.

Petitioners can simply cite to *no* evidence that the Eighth Circuit "relaxed" the burden of proof as set forth in *Tamiami.* Even a brief perusal of their argument reveals

that their argument consists only of contrived, semantic word games. The Eighth Circuit applied precisely the same *Tamiami* standard in this case that this court adopted one month ago in *Western Air Lines* v. *Criswell, supra.*

## II.

**There is no basis for this court to grant the petition for Writ of Certiorari for the purpose of reviewing the appellate court's decision on petitioner's theory that the court conducted a** de novo **review of the facts, because the court of appeals correctly applid the "clearly erroneous" standard.**

The Eighth Circuit's reversal of the lower court rests squarely on the standard set forth in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); namely, that the lower court's finding may be reversed as clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made.

There is no question but that the appellate court is entitled to conduct its own review of the evidence in this case. In fact, this court recently found, in discussing Rule 52(a), the "clearly erroneous" rule, that Rule 52(a) has never forbidden the *independent* examination of the *entire* record by the appellate court, and noted that even the *Gypsum* court emphasized that the reviewing court must look at the *entire evidence* in arriving at its definite and firm conviction that a mistake has been committed. *Bose Corporation* v. *Consumers Union of United States, Inc.*, ___U.S.___, 104 S.Ct. 1949, 1959 (1984).

When the Eighth Circuit independently examined the entire lower court record, they found that the lower court had based its decision on the following:

1. *Outright mischaracterization of the facts in the record.* As aforementioned in the statement of the case, the

record reveals that the lower court either deliberately or mistakenly mischaracterized several key facts presented in this case. For example, the lower court mischaracterized the testimony of the Patrol's expert physiologist when it stated that Dr. Lind testified that an average 45 year old male could not perform the duties of the Patrol. The record shows that Dr. Lind actually testified that half of the 45 year olds could perform Patrol duties, and the other half could also perform but by using the emergency muscular reserve and tiring quickly. As another example, the lower court blatantly misstated the testimony of the Patrol's cardiologist, Dr. Antlitz, when it stated that the risk of heart diseases increased at a "rate of one percent" from the thirties age group to the fifties. Dr. Antlitz actually testified that the risk of heart disease for 60 year olds is *five* times greater than that of 30 year olds. Even petitioner's expert witness, Dr. Mohler, reluctantly admitted this on cross-examination. The lower court actually substituted its own finding in place of the evidence on the record. It is worth emphasizing that no credibility choices are involved when the appellate court finds that the lower court has totally mischaracterized the evidence on record. A more sterling example of a "clear error" cannot be found.

2. *Distortion of the Tamiami standard.* The Eighth Circuit also found that the lower court distorted the *Tamiami* standard by heavily emphasizing the lack of physical fitness programs for the Patrol, and attempting to subjectively apply the *Tamiami* standards to a 60 year old force of ideal physical specimens, rather than 60 year old Patrol members *taken as they are.* The Eighth Circuit held:

> The District Court's digression into this subject reflects concern with the subjective motivations for the Patrol's policies. The *Tamiami* test, however, focuses on objective evidence, in support of the BFOQ.

> The test also does not evaluate the age restrictions in terms of an ideal employee. It simply requires objective evidence on whether the older employees can perform their duties or on whether there is a practical way to differentiate among employees other than age. As the Patrol suggests, "[t]he district court . . . appears to base its decision invalidating the bfoq, on what it considers a 60 year old patrolman *could* be, if only 'remade' as the District Court sees fit.
> Reply Brief for Patrol at 2. The ADEA does not require so draconian an approach."

The Eighth Circuit cannot be expected to overlook such an obvious attempt to depart from the *Tamiami* objective standard and replace it with the lower court's version of a subjective standard, unsupported by any authority. In fact, the Eighth Circuit is not even bound by the "clearly erroneous" standard when it has found that the lower court erred by altering a legal standard. As another appellate court recently held:

> However, it is well settled that the clearly erroneous limitation does not apply to the review of a district court's legal conclusions and inferences drawn from the facts, and that the appellate court is free to make an independent determination from the same facts of the determinative legal conclusions and inferences.

*United States* v. *Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. den'd.*, 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 46, citing *United States* v. *Mississippi Valley Generating Company*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961).

The lower court's tampering with the *Tamiami* standard *alone*, justifies the Eighth Circuit's reversal.

3. *Petitioner's experts.* The Eighth Circuit could not ignore the strange and bizarre opinions offered by petitioner's medical expect, Dr. Mohler, the self-professed

aerospace physician who offered a variety of opinions in this case. Dr. Mohler testified on the stand that 90 year olds should not only be *kept* on the Patrol, but that 90 year olds should be accepted as entering cadets in the Patrol. Always somewhat of a champion of the rights of 90 year olds, Dr. Mohler also expressed outrage that the FAA forbids 90 year olds from flying commercial planes. Dr. Mohler opined that senility is caused by a virus; 80% "of the people" never get senility; and that there is *no* relationship between age and deterioration of hearing, distance vision, strength, coordination, endurance, adaptability to temperature changes, aerobic capacity, obesity, cardiovascular response, tolerance of stress, fatigue threshold, high blood pressure, impairing disease and cardiovascular disease. Dr. Mohler also offered a five-year guarantee against heart attack to any "essentially normal person" who passed his tests. It had only been a two-year guarantee seven months earlier, when he had testified in *Hoefelman* v. *Conservation Commission of the Missouri Department of Conservation*, 541 F.Supp. 272, 274, fn. 1, (W.D. Mo. 1982).

The Eighth Circuit emphasized that even Dr. Mohler, however, failed to testify that this test could predict *anything* as to what would happen to *Patrol* members when they confronted the innumerable stressful situations that arise in their work. The *Tamiami* test specifically requires a determination as to the accuracy of testing individuals who perform Patrol duties; not just "essentially normal persons".

Respondents have already set out the thorough, well reasoned opinions of the Patrol's experts in the statement of the case. There is really no question that the lower court clearly erred in crediting Dr. Mohler's opinions.

Obviously the lower court clearly erred in mischaracterizing key evidence on the record, substituting a subjective standard for the proper objective *Tamiami* standard,

and crediting Dr. Mohler's testimony. Nothing in this court's recent *Anderson* v. *City of Bessemer City*, ____U.S.____, 105 S.Ct. 1504 (1985), decision conflicts with the result of the Eighth Circuit in reversing the lower court. For even on the limited question of credibility of witnesses, this court held in *Anderson*:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, *e.g.*, *United States* v. *United States Gypsum Co.*, *supra*, 333 U.S., at 396, 68 S.Ct., at 542.

*Id.* at 1512, 1513.

Petitioners submit that this is simply a case in which the lower court based its decision on complete mischaracterizations of the record, a distorted legal standard, and the testimony of Dr. Mohler, whose crusade for 90 year old commercial pilots and Patrol members, together with his bogus five-year "guarantee" against heart attack surely places his testimony in the category of "so internally inconsistent or implausible on its face", that under any authority, the Court of Appeals correctly found that the lower court clearly erred. *Id.*

## III.

**This court should refuse to grant the petitioner's request for certiorari on the question of the effect of the fed-**

**eral retirement statute because the appellate court had already determined that the patrol's mandatory retirement age was a bona fide occupational qualification under the** Tamiami **test, before it even mentioned the federal statute** in dicta, **and thus did not rely on the federal retirement age statute to reach its decision.**

This court's recent holding in *Johnson* v. *Mayor and City Council of Baltimore*, ____U.S.____ Nos. 84-518 and 84-710 (June 17, 1985), in no way conflicts with the Eighth Circuit's holding. As aforementioned, the Eighth Circuit's holding that the Patrol's mandatory retirement age was a bona fide occupational qualification rested squarely on the *Tamiami* test, recently adopted by this court. *Western Air Lines* v. *Criswell*, No. 83-1545 (June 17, 1985). Following seven pages of discussion on this test, and its conclusion that the Patrol's mandatory retirement was a bona fide occupational qualification under the *Tamiami* test, the court merely noted in one paragraph of dicta that federal law enforcement officers are retired at 55 which is also persuasive on this issue.

This hardly compares to the *Johnson* case, in which the Fourth Circuit held that a federal retirement age of 55 for firefighters established *as a matter of law* that a state firefighter's retirement age of 55 is a bona fide occupational qualification under the ADEA. The Patrol never even argued this. The Eighth Circuit certainly did not hold that the federal law enforcement retirement statute established the Patrol's retirement age as a bona fide occupational qualification. It only followed the strict language of the *Tamiami* test in finding that the Patrol's retirement is a bona fide occupational qualification under the ADEA. And petitioner's contention that the Eighth Circuit somehow "relaxed" the standard because of this federal statute is not only without support in the record, but without sup-

port in petitioner's brief, for they cite no evidence to support this novel theory.

IV.

**Certiorari should not be granted on the question of whether the appellate court should have analyzed each rank of the patrol in its bona fide occupational qualification analysis, because, in fact, the appellate court did consider every rank of the patrol in its bona fide occupational qualification determination.**

Petitioners correctly note that the Eighth Circuit, in *EEOC* v. *City of St. Paul,* 671 F.2d 1162 (8th Cir. 1982), held that in determining whether a mandatory retirement age is a bona fide occupational qualification, an inquiry must be made as to each occupation affected, as opposed to the business as a whole. And though this court has never reached this issue, respondents have never disputed this point. Petitioners now argue that the Eighth Circuit did not consider each "occupation" or rank of the Patrol, contrary to their earlier decision, and advance this as a reason for this court to grant certiorari.

The Patrol, of course, presented evidence on the duties of every rank of the Patrol in support of its assertion that the mandatory retirement age is a bona fide occupational qualification for every rank of the Patrol. The appellate court clearly considered each rank's duties in its *Tamiami* analysis of the evidence. The Eighth Circuit first noted that there are Patrol members 55 years and older in every rank of the Patrol. It found that though patrolmen and corporals spend the most time working the road, that *all* ranks travel the road as part of their normal duties or coming to and from work, and that anytime they are in their car, they are under orders to enforce the traffic laws,

act when a felony is committed in their presence, and protect lives and property when they are endangered. This evidence was unrefuted. *All* ranks are also under orders to patrol the roads on holiday weekends. Thus, all members must be prepared to confront a number of physically and emotionally strenuous activities, including rescuing and rendering first aid to accident victims, pushing cars off the road, engaging in high speed chases, handling abusive or violent motorists, and wrestling with apprehended drunk drivers. Moreover, when these Patrol members drive, they drive alone, and they must be prepared to confront all of the above emergencies *alone*.

Petitioners again fail to demonstrate, in light of the unrefuted evidence of the duties of *every* rank of the Patrol, that the Eighth Circuit in any way failed to consider every rank in its decision that the mandatory retirement age is a bona fide occupational qualification for *all* ranks of the Patrol.

## CONCLUSION

Petitioners have failed to demonstrate that this case presents any questions which justify full, plenary review by this court. The Eighth Circuit strictly applied the *Tamiami* test to the instant case, and petitioners dispute the application and result. This court has itself adopted the *Tamiami* test. There is simply no conflict among authorities on this issue such to justify a full review by this court.

For these reasons the petition for certiorari should be denied.

Respectfully submited,

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